plainant. The circumstances in the case of one complainant may be such that equity would refuse to grant its extraordinary remedy because to grant it would be inequitable but it does not follow at all from this that the other complainant could not make out a case where it would be equitable to grant an injunction. If the circumstances are altered and one party is seeking an equitable remedy against two violators of the same covenant, it is easy to conceive that he might make out a great deal stronger case against the one than against the other. He might be able to show that because of the violation of the one he was being greatly injured and was entitled to equitable redress, but as to the other the circumstances might be such that, though the same covenant was being violated, if equity interfered, it would only result in causing great loss to the respondent without benefiting the complainant.

ACTION BY A WIFE AGAINST HER HUSBAND FOR A TORT TO THE PERSON.

In the recent case of *Brown v. Brown,* (89 Atl. 889, Conn.) it was held that, in view of the Married Woman's Act (Public Acts, Conn., 1877, ch. 14), which had the effect of abolishing the common law unity of husband and wife, a wife may now maintain an action for false imprisonment and assault against her husband, such an action not being against public policy.

It is inevitably necessary, in reviewing a decision of so far-reaching an effect to consider somewhat the development of the rights of femes covert from the earliest times. At common law, since the unity of husband and wife rendered it impossible for the wife to sue the husband, it necessarily followed that she could not sue him for a tort committed against her.[1] This was considered decisive of the matter, as indeed it was, but the dictates of public policy, preventing such an action by reason of the supposed consequent disruption of the home, were also often referred to.[2] Nor could a wife maintain a suit after divorce for a tort committed during the coveture by her husband;[3] for her dis-

[1] *Abbott v. Abbott,* 67 Me. 304; *Phillips v. Barnet,* 1 Q. B. 436, 1 Jagg. Torts 463; *Freethy v. Freethy,* 42 Barb. 641; *Peters v. Peters,* 42 Iowa 182.

[2] See cases cited *supra,* note 1.

[3] *Abbot v. Abbott supra; Strom v. Strom,* 98 Minn. 427; *Main v. Main,* 46 Ill. App. 106; *Nickerson v. Nickerson,* 65 Tex. 281.

ability did not rest alone upon the necessity of joining the husband, but upon the proposition that no right of action ever accrued.[4]

Nor could a woman, either before or after divorce, maintain an action against third persons who assisted her husband to commit a tort against her during coverture. Such a suit could be maintained, if at all, only by joining the husband and he, of course, could not join.[5] The same principles were applicable to suits by the husband against the wife but not to suits by the husband against third persons.[6] By the older law, moreover, a husband might give a wife correction,[7] within reasonable bounds;[8] for as he was to answer for her misbehavior it was thought but just to intrust him with the power of constraining her.[9] The civil law as to such correction went even further, allowing for gross misdemeanors violent floggings with whips and rods. (*Flagellis et fustibus acriter verbare uxorem.*);[10]but our latest state decisions deny that even the power conceded at common law longer exists,[11] although as late as 1868 the Supreme Court of North Carolina, while not recognizing the right, refused to interfere in a case of moderate correction.[12]

As to the contractual rights of married women the law was more liberal, especially as regards the sole and separate estate. In the common law courts, to be sure, contracts between husband and wife were not recognized.[13] But if a separate estate was settled on a feme covert equity would protect her rights, though they arose out of contracts with her husband,[14] and where the distinctions in procedure between law and chancery have been abolished the logical result has been that wives may sue their husbands or

[4] *Abbott v. Abbott supra.*

[5] *Abbott v. Abbott supra,* Tiffany on Persons (2d. Ed.) p. 74.

[6] Tiffany *supra.*

[7] 1 Hawk P. C. 2.

[8] Moor. 874.

[9] 1 Black. Comm. 444

[10] Schouler Dom. Rel. p. 72.

[11] *Gholston v. Gholston,* 31 Ga., 625; *Edmond's Appeal,* 57 Pa. St., and see the principal case.

[12] 1 Phill. 453. See *State v. Oliver,* 70 N. C. 60.

[13] *National Granite Bank v. Wicher,* 173 Mass. 517; *Ellsworth v. Hopkins,* 58 Vt. 705; *Hoker v. Boggs,* 63 Ill. 161.

[14] *Kutz's Appeal,* 40 Pa. St. 90; *Bank v. Greene,* 14 R. I. 1; *Leahy v. Leahy,* 97 Ky. 59; *Thoms v. Thoms,* 45 Miss. 263.

such contracts like any other persons.[15] So also, where statutes giving the power to married women to hold property free from the control of their husbands have been passed, it is generally held that a right of action against her husband was thereby given a married woman for torts to her property.[16] Thus she may bring replevin against [17] or sue for conversion[18] by her husband.

A more variable view has been taken of statutes changing the status of married women as to their power to sue generally on contracts made with their husbands, in the absence of express provision to that effect in the statutes. In the leading case of *Mathewson v Mathewson*[19] it was held, in construing the same Married Woman's Act under discussion in the present case, that a wife may enforce a promissory note given to her by her husband and that the recitals in the Act giving her power to make contracts with third persons did not negative her power to contract with her husband. The Court remarked that "in enacting this law the State adopted a fundamental change of public policy" that, "by it the unity in the husband of his own and the wife's legal identity was removed."

This position under similar statutes is supported by some jurisdictions,[20] and denied by others[21] according to whether or not such statutes are strictly construed.

When, however, a wife seeks, by virtue of the Married Woman's Acts or otherwise, to enforce a liability against her husband for a personal tort the case under discussion stands alone. As recently as 1913 it has been laid down as a general rule that in no American jurisdiction can the wife sue or be sued by her husband for a tort to the person.[22] Thought many of the same juris-

[15] *Wright v. Wright,* 54 N. Y. 437; *Adams v. Adams,* 24 Hun. 401; *May v. May,* 9 Neb. 16.

[16] *Mason v. Mason,* 66 Hun. 386; *Ryerson v. Ryerson,* 55 Hun. 69; *Chestnut v. Chestnut,* 77 Ill. 346; but see *Walker v. Reamy,* 36 Pa. St. 410.

[17] *Martin v. Robson,* 65 Ill. 129; *Gillespie v. Gillespie,* 64 Minn. 381.

[18] *Mason v. Mason supra.*

[19] 79 Conn. 23.

[20] *In re Deaner,* 126 Iowa 701; *Leahy v. Leahy supra; May v. May supra; Greer v. Greer,* 24 Kan. 101; *Grubbe v. Grubbe,* 26 Or. 363; *Pearson v. Pearson,* 60 N. H. 497.

[21] *Roseberry v. Roseberry,* 27 W. Va. 759; *Ritter v. Ritter,* 31 Pa. St. 396; *Kalfus v. Kalfus,* 12 Ky. Law Rep. 839.

[22] Peck on Dom. Rel. p. 123. See *Frethy v. Frethy, supra; Longendyke v. Longendyke,* 44 Barb. 366; *Abbe v. Abbe,* 22 App. Div. 483; *Bandfield v. Bandfield,* 117 Mich. 80; *Strom v. Strom supra; Peters v. Peters*

dictions which deny a tort liability concede that a husband may be sued by his wife on her contracts and that the unity of husband and wife which existed at common law is destroyed, the relief is wife which existed at common law is destroyed, the relief is withheld on another ground. It is said that the disability under which the wife labors rested not only on the principle that the husband and the wife are one, but also on a sound public policy which discourages the making of matrimonial bickerings a cause of action for damages.[23] The arguments to this effect are probably summed up as well as anywhere in a Maine decision by Judge Peters. He said: "We are not convinced that it is desirable to have the law as the plaintiff contends it to be. There is no necessity for it. Practically the married woman has remedy enough. The criminal courts are open to her. She has the writ of habeas corpus if unlawfully restrained. As a last resort, if need be, she can prosecute at her husband's expense a suit for divorce. If a divorce is decreed she has dower in all his estate, and all her * * * * causes of complaint * * * * can be considered by the court and compensation in the nature of alimony allowed her for them. * * * * With divorces as common as they are nowadays there would be new harvests of litigation. * * * * We believe that the rule which forbids all such opportunities for law suits and speculation to be wise and salutary."[24]

To this view there are several possible answers. In the first place, since it is admitted that the legal unity of husband and wife is dissolved, it seems necessarily to follow that the wife can sue her husband as well for a tort as on her contracts with him. In the words of the principal case, "if she can sue him for a broken promise, why may she not sue him for a broken arm?" The technical objection of joinder being removed, what is there to prevent the suit? Stress is laid on the fact that nowhere in the Acts is it expressly provided that she may sue her husband in tort. Yet though it was not so provided as to contracts either, that dif-

supra; Libby v. Berry, 74 Me. 286; *Peters v. Peters,* 156 Cal. 32, 23 L. R. A. (n. s.) 699; *Sykes v. Speer,* 112 S. W. 422; *Schultz v. Thompson v Thompson,* per Day, J, 218 U. S. 611, 30 L. R. A. (n. s.) 1153; Harlan, Holmes, and Hughes, JJ. dissenting; but see *Schultz v. Schultz,* 63 How. Pr. 181, reversed without opinion, 89 N. Y. 644.

[23] Blackburn, J. in *Phillips v. Barnet,* 1 Q. B. D. 436, and see Schouler Dom. Rel. p. 79.

[24] *Abbott v. Abbott supra.*

ficulty was not allowed to prevent suits by a wife on contracts against her husband. Once admit that the legal equity of the wife is the same as before marriage, and the logical result ensues that she may sue and be sued as a *feme sole,* even where her husband is concerned.

Then, again, it is argued that public policy is a bar to such actions. But with that, strictly speaking, the courts have nothing to do. If the technical legal right be clearly and manifestly given, though by implication, the argument of public policy should not stand in the path. Says Mr. Justice Harlan, discussing such statutes in his dissenting opinion in the Thompson case:[25] "With the mere policy, expediency, or justice of legislation the courts in our system of government have no rightful concern. Their duty is only to declare what the law is, not what in their judgment it ought to be. * * * * Now, there is not here, as I think, any room whatever for mere construction. * * * *"

But conceding for the purpose of argument that the question of policy may be inquired into, it is not apprehended that the disasterous results which in many decisions it is assumed would come to pass, will be the result of allowing the action to be maintained. Action of tort, between husband and wife, would, we think, be confined, for the most part, to such cases as would justify the bringing of the action. These statutes are remedial and, as such should be liberally construed, if construction is needed.[26] The wife should not be compelled to resort to the criminal courts, or be force, in the alternative, to bring a suit for divorce; to both of which proceedings an inevitable stimga attaches, in order to obtain redress.

It is therefore submitted that the view of the principal case is correct, both as a matter of construction and as a decision in harmony with the spirit of the times. Indeed, it is difficult to see, having due regard for the fact that in the Mathewson case the Act was declared to have worked a fundamental change in the status of husband and wife, involving complete equality, how the court could logically have decided otherwise.[27]

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[25] 218 U. S. 611.

[26] *Wolcott v. Pond,* 19 Conn. 597; *Hudler v. Goldon,* 36 N. Y. 466; *Jackson v. Warren,* 32 Ill. 331.

[27] See *Mathewson v. Mathewson supra.*